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Supreme Court of the United States

OCTOBER TERM—1974

No. 74-375

SHELL CHEMICAL COMPANY,
a Division of Shell Oil Co.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
TEAMSTERS LOCAL 676, etc.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States Supreme Court and the Associate Justices of the United States Supreme Court:

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cases (Nos. 73-1399; 73-1401) on July 8, 1974.

Opinions Below

This petition of Shell Chemical Co. (hereinafter "Shell") results from a decision of the United States Court of Appeals for the Fifth Circuit in two cases consolidated for the purpose of appeal. In case No. 73-1399 the Court of Appeals granted a motion of the National Labor Relations Board (hereinafter "Board") to dismiss Shell's petition for review of an order of the Board quashing a Notice of Hearing issued pursuant to Section 10(k) of the National Labor Relations Act, as amended, 29 U.S.C. §160(k), (hereinafter "Act").[1] In case No. 73-1401 the Court of Appeals denied Shell's petition for review of an order of the Board dismissing a complaint by the General Counsel charging respondent Teamsters Local 676 (hereinafter "Teamsters") with a violation of Section 8(b)(7)(C) of the Act, 29 U.S.C. §158 (b)(7)(C). These adverse rulings and the underlying decisions of the Board, occurred as follows:

1. The Decision and Order of the Board Quashing Notice of Hearing was issued on October 11, 1972 and is reported at 199 NLRB No. 95 (Appendix A). A Motion for Reconsideration and to Reopen the Record was denied on January 15, 1973 (Appendix B). These rulings were the subject of Shell's petition for review in the Court of Appeals in No. 73-1399, which shall be referred to herein as the "jurisdictional dispute case."

2. The Decision and Order of the Board dismissing the Complaint of the General Counsel alleging that respondent Teamsters violated Section 8(b)(7)(C) of the Act issued on September 29, 1972 and is reported at 199 NLRB No. 70 (Appendix C). Reconsideration of this

[1] 61 Stat. 519, 29 U.S.C. §151 et seq.

action was denied on January 15, 1973 (Appendix D). These rulings were the subject of Shell's Petition for Review in the Court of Appeals in No. 73-1401, which shall be referred to herein as the "recognitional picketing case."

3. The decision of the Court of Appeals for the Fifth Circuit in both of these cases was issued on June 14, 1974 (Appendix E). Judgment was entered on July 8, 1974 (Appendix F).

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on July 8, 1974. The mandate of the Court of Appeals was issued on July 30, 1974.

The decision below raises several questions of national importance in the field of labor law. Moreover, with respect to the reviewability of an order of the Board quashing a Section 10(k) Notice of Hearing, the Fifth and Ninth Circuits are in conflict.

Accordingly, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1) and Supreme Court Rule 19.

Questions Presented

1. Is a decision of the Board quashing a Section 10(k) Notice of Hearing after the hearing has been completed, a final appealable order within the meaning of Section 10 (f) of the Act and Section 704 of the Administrative Procedure Act?

2. Where a manufacturing company cancels certain work being done under contract by a maintenance contractor,

which results in termination by the maintenance contractor of certain of its union employees, is picketing of the manufacturing company, by the union representing the terminated employees, to force the manufacturing company to employ them at the same or similar wages and working conditions, "recognitional" within the meaning of Section 8(b)(7)(C) of the Act?

3. Where a union pickets to force one employer to hire the discharged employees of another employer, is reliance upon the Board's *Fanelli Ford* decision error?

Statutes Involved

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq. are as follows:

Section 8(b)(4)(D)—29 U.S.C. §158(b)(4)(D)

Section 8(b)(7)(C)—29 U.S.C. §158(b)(7)(C)

Section 10(f) —29 U.S.C. §160 (f)

Section 10(k) —29 U.S.C. §160 (k)

Also relevant is Section 704 of the Administrative Procedure Act (A.P.A.) 5 U.S.C. §704. Each of the foregoing sections of the Act and Section 704 of the A.P.A. is reproduced verbatim in Appendix G hereto.

Statement of the Case

A. The basis for federal jurisdiction.

These cases arise from charges filed by petitioner alleging violations of Sections 8(b)(4)(D) and 8(b)(7)(C) of the Act.

In the jurisdictional dispute case the Court of Appeals dismissed the Petition for Review holding that the quashing of a Notice of Hearing issued pursuant to Section 10 (k) of the Act, after a full hearing on the issue, is not a final reviewable order under Section 10(f) of the Act. Petitioner asserts that jurisdiction does lie for such review under Section 10(f). The Court of Appeals took jurisdiction in the recognitional picketing case but denied Shell's petition.

B. The proceedings below.

These cases came before the Court of Appeals on petitions seeking review of decisions and orders of the Board (Appendices A and C). The jurisdictional dispute case arose from a Charge and Amended Charge filed by Shell alleging that respondent Teamsters was engaged in picketing and other conduct in violation of Section 8(b)(4)(i)(ii)(D)[2] of the Act (93a-94a)[3].

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[2] 29 U.S.C. §158(b) (4) (D).

[3] Parenthetical references to page numbers followed by the letter "a" are to pages in the Appendix of proceedings before the Court of Appeals, which has been filed with this petition.

After investigation, the Board issued a Notice of Hearing pursuant to Section 10(k) of the Act[4] to resolve the jurisdictional dispute (95a). The notice described the dispute as "driving a one and one half ton stake body truck at the Shell plant in West Deptford, New Jersey". Hearings were held on May 18 and June 2, 1972 (97a-170a).

In related Section 10(l) proceedings[5] the United States District Court for the District of New Jersey granted a temporary injunction restraining further picketing and related conduct.[6] The transcript of that proceeding was received in evidence in the Section 10(k) hearing by stipulation of the parties (99a-100a).

On October 11, 1972, the Board, after completion of the 10(k) hearing, issued its decision and order quashing the Notice of Hearing on the basis that a jurisdictional dispute within the meaning of the Act did not exist (Appendix A). Thereafter, Shell filed a Motion for Reconsideration and to Reopen the Record which the Board denied on January 15, 1973 (87a, 179a) (Appendix B).

Following the filing of the Petition for Review in the Court of Appeals the Board and Teamsters moved to dismiss on the ground that the Board's order quashing the Notice of Hearing was not a final and appealable order under Section 10(f) of the Act. Briefs in support and in opposition to the motions were submitted, whereupon the Fifth Circuit issued an order directing that the motions be "carried with the case". Subsequently, the court granted the motions to dismiss (Appendix E).

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[4] 29 U.S.C. §160(k).

[5] 29 U.S.C. §160(l).

[6] *Bernard Samoff, Regional Director, etc.* v. *Teamsters Local 676,* Civil No. 318-72 (D.C. N.J. 1972).

In addition to the jurisdictional dispute case, Shell filed a charge alleging that the picketing had a recognitional object in violation of Section 8(b)(7)(C) of the Act (2a, 3a). Following investigation, the Regional Director issued a Complaint alleging a violation as charged (4a). The matter was submitted to the Board by written stipulation which incorporated the transcript of the injunction hearing in the District Court and the exhibits introduced during that proceeding (10a-13a). On September 29, 1972 the Board issued its Decision and Order finding no violation of the Act and dismissing the Complaint (Appendix C). Shell filed a Motion for Reconsideration which was denied on January 15, 1972 (Appendix D). Relying upon the decision of the Board in *Fanelli Ford* the Court of Appeals denied Shell's Petition for Review.

Statement of Facts

Shell is engaged at its West Deptford, New Jersey plant in the manufacture, sale and distribution of polypropylene and related chemical products (102a). At the time of the events giving rise to this proceeding, Shell employed approximately 250 employees at the plant, 135 of whom were directly engaged either in the production process or in the performance of plant maintenance (102a-103a).

The maintenance services required by Shell at its plant have historically been performed by Shell's own maintenance employees and by various maintenance contractors including Catalytic, Inc. (hereinafter called "Catalytic") (196a). While the type of work performed by employees of Catalytic and of Shell is of the same nature and coextensive, their crews work independently of each other (106a, 115a, 166a-167a). In December, 1971 Catalytic em-

ployed approximately 25 men in the performance of such work whereas Shell employed 40 to 50 maintenance employees. Moreover, while Catalytic was party to collective bargaining agreements with various building trade unions representing its maintenance employees, Shell's maintenance employees were unrepresented (104a, 111a).

William Pollinger, the individual whose termination by Catalytic prompted the events giving rise to this proceeding, was represented by Teamsters Local 676 and drove a 1½ ton truck which, although belonging to Shell, was under the control of Catalytic (16a) and used exclusively in support of Catalytic's employees (119a-120a).

Pollinger was laid off by Catalytic on December 9, 1971 because of a depletion of its backlog work at the Shell plant (16a, 164a-165a). Nine other employees, all represented by various building trade unions, were simultaneously laid off by Catalytic (162a).

Teamsters immediately sought to secure Pollinger's reemployment by Catalytic (162a). Catalytic refused because of a lack of work. Thereupon, Teamsters Business Agent, Moses Jackson, wrote to Shell demanding that Pollinger ". . . remain on the job" and that ". . . the terms of the Teamsters Local 676 Agreement covering him be permitted to remain in effect" (45a). Shell responded by letter dated December 29, 1971 indicating that Pollinger was not their employee and that Jackson's request should be directed to Catalytic (46a). On January 20, 1972 Teamsters began picketing Shell's plant with signs that read: "Shell unfair to William Pollinger/unfair to Teamsters Local 676" (17a). In a subsequent letter dated January 26, 1972 Jackson attempted to disavow any recognitional object stating: "We simply request that you employ Mr. Pollinger under similar conditions with sim-

ilar duties to those he enjoyed while employed by his former employer" (47a).

Concurrently, an organizational drive was in progress wherein Oil, Chemical and Atomic Workers International Union, AFL-CIO (hereinafter "O.C.A.W.") sought to be designated as the collective bargaining representative of Shell's employees, including those performing maintenance work. On January 4, 1972 the Regional Director for the Fourth Region of the Board approved a Stipulation For Certification Upon Consent Election entered into pursuant to a petition filed by O.C.A.W. to represent the following unit of Shell's employees:

> "all process operators, operators and production employees, but excluding all plant clerical and office clerical employees, professional employees, guards, laboratory employees, and supervisors as defined in the Act" (171a).

This unit embraces all of Shell's maintenance employees who are classified generally as process operators and operators (115a). Teamsters, although aware of the filing of the petition for an election by O.C.A.W., did not intervene or otherwise participate in the proceeding (18a-19a).

Shell does not now and never has had an agreement with Teamsters and does not employ an employee in the specific classification of "driver", the classification in which Catalytic employed Pollinger, although driving a truck is a part of the work duties of its maintenance employees (113a, 115a).

It was stipulated in the 10(l) proceeding that as a result of the Teamster's picketing, which continued through February 11, 1972, individuals employed by other employers had been induced not to pick up or deliver goods at Shell's

plant or to perform services there (17a). On February 9, 1972, while the picketing was still in progress, an election was conducted in the unit described above and O.C. A.W. was thereafter certified as the collective bargaining representative of these employees.

The record of proceedings before the Board reflects that after the lay off of Pollinger, the truck he drove was returned to Shell and is used by Shell's employees on an intermittent basis in the performance of their maintenance work. It is not used in support of the maintenance work performed by Catalytic or by Catalytic maintenance employees (16a, 115a, 135a).

The record before the Board also reflects that at all times Pollinger was on Catalytic's payroll (111a). Moreover, it is clear that Shell had no control over the labor relations of Catalytic and no voice in its hiring, lay off or other personnel actions (111a). The record reveals that Pollinger was not laid off at the request of, or on the instruction of, Shell (111a). Finally, while the amount of work given to Catalytic has been reduced, Shell has never revoked, rescinded or modified Catalytic's contract and Catalytic is still performing work at the plant (18a).

In its decision the Court below granted the Board's motion to dismiss the Petition for Review in the jurisdictional dispute case for want of jurisdiction. It further denied review of the Board's dismissal of the Complaint in the recognitional picketing case. Accordingly, certiorari is being sought by this petition.

Reasons for Granting the Writ

A. Section 10(k) and the right to review.

The Court should accept review of the decision of the Fifth Circuit that a Board order quashing a Notice of Hearing issued pursuant to Section 10(k) of the Act is not final and reviewable because it erroneously interprets the Act and denies petitioner its fundamental right to the review of administrative orders which are irreversible, complete, and fully dispositive of all issues litigated. Moreover, the decision of the Fifth Circuit is in direct conflict with a decision of the Court of Appeals for the Ninth Circuit in *Waterway Terminals Co.* v. *N.L.R.B.*, 467 F.2d 1011 (9th Cir. 1972). Thus, unless the conflict is resolved by this Court, the right to review would depend solely upon the circuit in which the employer does business.[7] Clearly, the Congressional design of one national labor policy is frustrated where the basic right of review depends upon chance or fortuitous circumstances. Patently, such divergence among the circuits will foster forum shopping, and detract from stability in labor relations, which the Act was intended to achieve.

The need for judicial review in these circumstances is readily apparent from a brief examination of the underlying Board decision. Drawing from that decision, the Fifth Circuit stated:

> "The Board found that the object of Local 676 picketing was to gain reinstatement for Pollinger, and did not involve a contest with another union over the work performed by Pollinger." (23A)[8]

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[7] Review would also be available under Section 10(f) of the Act in the District of Columbia Circuit where a similar issue is now pending in *Metropolitan Printing Company, etc.* v. *N.L.R.B.*, No. 74-1372.

[8] Parenthetical references to page numbers followed by the letter "A" are to pages in the Appendix to this Petition.

That statement is illustrative of the extent to which the Board misconceived the evidence in this case. First, the demand was not for reinstatement but for initial employment. Secondly, there indeed was a contest over work, namely the truck driving duties of Shell's own employees. In fact, the record reflects that to hire Pollinger for this work would have resulted in the discharge of a Shell employee (122a).

In this factual setting, the finding by the Board that no jurisdictional dispute existed between Teamsters and O.C.A.W., (which had a petition pending seeking to represent all of Shell's maintenance employees), misses the point. Petitioner's contention before the Board was that there was in fact a jurisdictional dispute and that it was between *Teamsters and Shell's then unrepresented employees.*

It is well settled that the competing entities for particular work need not be labor organizations. The Board has consistently held that unrepresented employees constitute a claiming group under Sec. 8(b)(4)(D) and 10(k) of the Act, 29 U.S.C. §158, §160(k), *Electrical Workers I.B.E.W. (Bendix Corp.),* 138 NLRB 689 (1962). It is also well established that the applicability of Section 10(k) is not dependent upon the existence of a dispute between two or more groups of employees *actively* competing for a work assignment. *Local 1291 International Longshoremen Association (Pocahontis Steamship Co.),* 152 NLRB 676, 679; *Waterway Terminals Co.,* 185 NLRB No. 35 (n. 5) (1970).

As the Ninth Circuit said in *Carpenters* v. *C. J. Montag & Sons,* 335 F.2d 216, 221 (9th Cir. 1964):

> "The fact that one union has the jobs and holds on to them in a polite, non-belligerent manner while the other union uses the forbidden tactics in an effort to get them, or get some of them, does not mean

that what Congress regarded as the evils of a jurisdictional dispute are not present."

The point, and it is an extremely important point, is that the dispute existed whether or not Shell's unrepresented employees or O.C.A.W. actively claimed the work. It must be emphasized that O.C.A.W. did not in fact represent Shell's employees but at that very time had a petition pending for such purpose. Regrettably however, although the Board later found that O.C.A.W. was not claiming the work, contrary to its normal practice of seeking out all parties that could have an interest in the proceeding, the Board did not see fit to serve O.C.A.W.[9]

This error is compounded by the fact that the Board subsequently certified O.C.A.W. as the collective bargaining representative in a unit of Shell's production and maintenance employees which included "[T]hose employees performing maintenance work formerly performed by the laid-off Catalytic employees." (4A) How then may it be presumed that O.C.A.W. was not seeking to include truck driving as a duty of Shell employees in the performance of their maintenance work? Would O.C.A.W. permit their unit to be fragmented by the exclusion of this work or permit any individual to take from their members the truck driving work assigned to them by Shell? Since O.C.A.W. did not receive a notice of the hearing setting forth the nature of the proceeding it had no voice in the resolution of that question.

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[9] O.C.A.W. did receive a copy of the Board's letter dated May 19, 1972, advising that the hearing opened on May 18, 1972, and would be continued on June 2, 1972. However, that letter did not describe the dispute and was, therefore, ineffective as notice. Shell, in its Motion for Reconsideration, urged unsuccessfully that the record be reopened to ascertain O.C.A.W.'s position in this jurisdictional controversy. Shell did so because of the astonishing statement by the Board that O.C.A.W. was not claiming the work despite the fact that O.C.A.W., not having been served, had not been given an opportunity to express a position.

In sum, ignoring all of the foregoing, the Board found that no jurisdictional dispute existed premised upon the erroneous conclusion that Teamsters was seeking the reinstatement of one of its members. (6A, 15A) Factually, however, Teamsters was seeking the *initial employment of Pollinger by Shell* in a position which he never held, namely, driving a truck for Shell in support of the activities of Shell's maintenance employees. Clothing that decision and order in immunity from review leaves Shell and companies similarly situated vulnerable to continued jurisdictional picketing when contract maintenance work is terminated with neither a remedy nor a forum in which to be heard.

The Board's decision creates a whole new troublesome area by misapplying work preservation concepts to jurisdictional dispute controversies. In so doing, incongruously, the Board protects the work claim of the union representing the outside contractor's employees, whereas work preservation concepts were intended to protect the permanent work force from just such intrusions upon their work tasks. *Fibreboard Paper Products* v. *NLRB,* 379 U.S. 203 (1964).

Review is warranted here not only because the decision below is in error, but more importantly because review in these instances is a matter of right under the statute and well established principles of administrative procedure. The fact that the decision is clearly erroneous, is highlighted by the opinion of the Ninth Circuit in *Waterway Terminals* which was unanimously of the view that reviewability was both a right and a practical necessity where the Notice of Hearing in a 10(k) proceeding is quashed.

Judge Trask, speaking for the court in *Waterway Terminals* said:

> "To deny review of a refusal to proceed to award under a Section 10(k) proceeding is to nullify the

> effectiveness of Section 8(b)(4)(D). The only avenue to relief from a dispute under that section is by way of a Section 10(k) proceeding. An order quashing a notice of hearing under Section 10(k) therefore constitutes a 'final order' as to the underlying charge based on Section 8(b)(4)(D). Appellee's argument would place the parties back to their original position, i.e., IBU claiming the work for its members and ILWU claiming the work for its members, and the employer and the public without power to solve the problem. Such is contrary to the scheme and purpose of Section 8(b)(4)(D) and Section 10(k) . . . The Board's order was, as to this Section 8(b)(4)(D) dispute, a 'final order of the Board.'" Id. 467 F.2d at 1016-1017 (citations omitted).

Neverthless, the decision below ignores the well reasoned decision of the Ninth Circuit in *Waterway Terminals* and accepts the contentions of the Board that only an order issuing from an unfair labor practice proceeding is final and reviewable under Section 10(f) of the Act. To do so the court must accept the analogy drawn by the Board between its action here and the refusal of the General Counsel to issue a complaint in unfair labor practice proceedings. It also accepts the analogy drawn between the jurisdictional dispute procedures of the Act and those provisions relating to representation proceedings. We submit that the court's definition of a final order under Section 10(f) of the Act is thus too restrictive and erroneous.

American Federation of Labor v. *N.L.R.B.*, 308 U.S. 401 (1940), cited by the court below, was an attempt to review a certification of the Board made pursuant to Section 9(c) of the Act. There, this Court stated that the entire structure of the Act emphasizes for purposes of review the distinction between an "order" of the Board

restraining an unfair labor practice and a certification in representation proceedings. That case, however, and others cited by the court below, standing for the proposition that refusal of the General Counsel to issue a complaint or that the issuance of certification is not subject to review, are not relevant here.[10] In the instant case an "order" was issued by the Board. Moreover, the issuance of a certification does not leave the employer or the union without further access to the processes of the Board and courts.[11] Rather, certification may be tested through the unfair practice procedure by the refusal of the employer to bargain with the union. *Electrical Workers, I.B.E.W.* v. *N.L.R.B.*, 417 F.2d 1144 (D.C. Cir. 1969), cert. denied, 396 U.S. 1004. Here, such further proceedings are not available, all avenues are foreclosed and review, at least in the Fifth Circuit, is precluded.

The litigation process in this case may hardly be compared to the refusal of the General Counsel to issue a complaint. Such action by the General Counsel is part of the preliminary and exclusive investigatory authority vested

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[10] *Anthony* v. *N.L.R.B.*, 204 F.2d 832 (6th Cir. 1953); *General Drivers, Chauffeurs and Helpers* v. *N.L.R.B.*, 197 F.2d 492 (10th Cir. 1950); *Lincourt* v. *N.L.R.B.*, 170 F.2d 306 (1st Cir. 1948). Of those cases cited, only *Manhattan Construction Co.* v. *N.L.R.B.*, 198 F.2d 320 (10th Cir. 1950) is in point. However, in that case the underlying dispute had been submitted to another body, the National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry. Thus, in quashing the Notice of Hearing the Board did not adjudicate and pass upon the applicability of the statute except insofar as it provides that a Notice of Hearing shall not issue where there exists another method or procedure to determine the dispute agreed upon by all parties.

[11] The Administrative Procedure Act (5 U.S.C. §554(a)(6)) specifically exempts from its adjudicatory requirements proceedings relating to the certification of worker representatives.

by Congress in the Board. In the instant case, however, rather than having made a determination that petitioner's charge was without merit, the Regional Director found that there was reasonable cause to believe a violation of the statute had been committed. Accordingly, he proceeded successfully to petition the U. S. District Court for the District of New Jersey for injunctive relief pursuant to Section 10(l) of the Act. Thereafter, a Notice of Hearing was issued and a thorough hearing conducted. Subsequently, the parties filed extensive briefs. In culmination of that process, the Board issued a decision and order containing findings of fact and conclusions of law. It then passed upon and rejected a motion for reconsideration. Under the circumstances, it is difficult to conceive a determination with greater finality both within the meaning of Section 10(f) of the Act and Section 704 of the Administrative Procedure Act, 5 U.S.C. §704.

In *American Federation of Labor* v. *N.L.R.B.*, 308 U.S. at 408-409 (1940), this Court said:

> "In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders'."

Similarly, in *Port of Boston Marine Terminal Association* v. *Rederiaktiebolaget Transatlantic,* 400 U. S. 62, 71 (1971), this Court said:

> ". . . [T]he relevant considerations in determining finality are whether the process of administrative

> decision making has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action."

Thus, the term finality merely addresses itself to the timing and appropriateness of review. Here, substantive rights have been determined, namely, that Shell may lawfully be picketed for these purposes, without remedy. Review is clearly timely and appropriate as no further proceedings before the Board are possible.[12]

The concept that review of Board orders should not be precluded where the litigation process has been initiated was advanced by *Leeds and Northrup Co.* v. *N.L.R.B.*, 357 F. 2d 527 (3rd Cir. 1966). There the Third Circuit asserted jurisdiction over a petition filed under Section 10(f) of the Act where the charging party before the Board objected to the General Counsel's acceptance of an informal settlement after a complaint had issued alleging a violation of the Act. Jurisdiction was asserted even though a formal order of the Board had not issued and the litigation process had not advanced beyond the mere issuance of a complaint. In *Leeds and Northrup* the court recognized that due process requires that a charging party be afforded the opportunity for complete adjudication of his charge, *including review,* where the un-

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[12] Compare *Laundry Workers* v. *N.L.R.B.*, 197 F.2d 701 (5th Cir. 1952), in which the petitioner was seeking to review the Board's refusal to issue a subpoena duces tecum as a final order under Section 10(f) of the Act. Clearly, such a ruling does not possess that degree of finality required by the body of cases that have considered the issue of judicial review of administrative actions. Accordingly, that case, upon which the court below relies heavily, is hardly pursuasive.

fair labor practice machinery has been put into operation. That principle applies with even greater force here, where, following the issuance of a Notice of Hearing, the litigation process proceeded through hearing and the filing of briefs. The order which was issued effectively terminated Shell's rights before the Board and left it without a remedy against picketing which it believed to be unlawful.[13]

In quashing the Notice of Hearing in the instant case, the Board relied upon the majority holding in *Waterway Terminals Co.*, 185 NLRB No. 35 (1970). In that 3 to 2 decision, the employer had subcontracted certain carloading work at one of its terminals, later terminated the contract and began performing the same work with its own employees. The thrust of the majority decision was that it perceived the union's objective as the preservation of work for employees they represented *and who had performed the work in the past.* On October 10, 1972, however, the day before the Board's decision in the instant case, the Ninth Circuit reversed the majority holding in *Waterway Terminals.* Shell then sought reconsideration based in part upon the failure of the Board to consider a judicial decision which reversed that upon which it had relied. The Motion for Reconsideration was denied without opinion by a simple order stating that the motion lacked merit. Ironically, subsequent to its decision in *Shell* and while this matter was before the Fifth Circuit, the Board issued its decision in *International Longshoremen's and Warehouseman's Union, etc.*

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[13] Contrast the situation where a jurisdictional dispute is found to exist. There if the offending party refuses to comply with the order of the Board the unfair labor practice procedure is continued through Section 8(b)(4)(D). *Here, however, no further proceedings before the Board are contemplated or possible.*

(*I.L.W.U.*) (*California Cartage Co.*), 208 NLRB No. 129 (1974), in which it said:

> "With respect to the Teamsters [sic] assertion that its picketing at Matson was not jurisdictional in nature in view of the Board majority's decision in *Waterway Terminals,* that case is distinguishable in that there the employer merely substituted one group of employees for another to do the same work at the same location during the term of an existing collective-bargaining agreement. *No such considerations apply where an employer, as here, determines to perform the disputed work with its own employees rather than those of a subcontractor.*" 85 LRRM 1289, 1293 (Footnote omitted) (Emphasis added).

In sum, the Board has obviously retreated from its *Waterway Terminals* holding in circumstances comparable to Shell's. Thus, the benefit and need for review of such decisions is readily apparent.[14]

In *Waterway Terminals,* as here, the Board's initial assault upon the petition raised the question of the court's jurisdiction by contending that no final reviewable order existed. The Ninth Circuit considered and rejected the contention that the quashing of a Section 10(k) Notice of Hearing after the hearing has been held is comparable to either the refusal of the General Counsel to issue a Complaint in other unfair labor practice proceedings or to an exercise of the Board's authority to issue certifications in representation proceedings. With regard to the latter, the Ninth Circuit said:

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[14] *California Cartage* was called to the attention of the Fifth Circuit following the submission of briefs.

"Nor do we find that this case is controlled by the absence of appealability of a Section 9 representation proceeding or the General Counsel's refusal to issue a complaint. In *American Federation of Labor* v. *N.L.R.B.*, 308 U. S. 401, 60 S. Ct. 300, 84 L. Ed. 347 (1940), the Court made the distinction plain as to the Section 9 argument.

> 'Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an "order" of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by §10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in §10, which says nothing of certifications. The other, authorized by §9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice.' 308 U. S. at 409, 60 S. Ct. at 304." Id. 467 F. 2d at 1016.

Rejecting the contention that the Board's action was comparable to the refusal of the General Counsel to issue a complaint, the Ninth Circuit said:

> "The cases cited by the Board holding that the General Counsel's refusal to issue a complaint is not appealable, are likewise inapposite. In those instances no proceedings were instituted upon which review could have been based. This Section 10(k) proceeding is distinctly to the contrary. A proceeding was begun by the Regional Director; facts were developed and a record made, pursuant to for-

> mal charges instituted by all three interested parties. It was tantamount to a hearing on a complaint issued by the Regional Counsel because the Board is required to make a determination, *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212,* 364 U. S. 573, 81 S. Ct. 330, 5 L. Ed. 2d 302 (1961), and that determination both completes the Section 10(k) proceedings, and resolves the Section 8(b)(4)(D) charge." Id. 467 F. 2d at 1016.

This Court has long espoused the view that in dealing with the question of finality, a practical rather than a technical construction is to be pursued. *Gillespie* v. *U. S. Steel Corporation,* 379 U. S. 148, 152 (1964); *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541 (1949); *Brown Shoe Co.* v. *United States,* 370 U. S. 294 (1962); *Dickinson* v. *Petroleum Conversion Corp.,* 338 U. S. 507, 511 (1950).

In *Lam Mon Chi* v. *Bouchard,* 314 F. 2d 664, 670 (3rd Cir. 1963), the Third Circuit stated that whether or not an order is "final" is ascertained by a "realistic" appraisal of the consequences of such action. Tested upon that standard, review by this Court would appear to be clearly appropriate. Petitioner's rights in the premises have been fully determined. A realistic appraisal of the consequences of the action by the Fifth Circuit leads to the inevitable conclusion that after fully litigating the issue the rug has been pulled out from under Shell and it is subject to continued picketing and other consequences of the contest for this work—without any forum in which to seek relief.

This Court made known its view of the legislative mandate contained in Sections 8(b)(4)(D) and 10(k) of the Act in *N.L.R.B.* v. *Radio Engineers Union Local 1212,* 364 U. S. 573 (1961). The words "herein determined", said this

Court, "convey not only the idea of hearing but also the idea of deciding a controversy." Thus, by force of that decision, the Board decisions in Section 10(k) cases were elevated from a negative determination to an affirmative award of the work in dispute to one of the competing unions or groups.

With due deference to the expertise of the Board we do not believe its orders in such cases should be so sacrosanct as to enjoy absolute freedom from judicial scrutiny. Surely, the purposes of the Act are best effectuated and the interests of the public best served by granting rather than denying review in these circumstances. Moreover, because of a conflict between these circuits, only through the granting of certiorari may this Court restore uniformity in application and enforcement of the Act.

B. The Section 8(b)(7) Violation.

In finding that the conduct of Teamsters did not constitute a violation of Section 8(b)(7)(C) of the Act, the court below, as did the Board, relies upon *Fanelli Ford Sales, Inc.*, 133 NLRB 1468 (1961). In *Fanelli Ford* a two man majority, Member Rodgers dissenting, expressly reversed the long standing doctrine of *Lewis Food Co.*, 115 NLRB 890 (1956), in which it had held that picketing to force an employer to reinstate dischargees inherently involves a recognitional object.

In the instant case, Shell vigorously asserted before the Board and the Fifth Circuit that *Fanelli Ford* was inapposite as here the issue *did not involve reinstatement of a former employee but a demand for the initial hiring of Pollinger by Shell, for work that he had never previously performed for Shell, and under terms and conditions of employment established by another employer, Catalytic.*

In *Fanelli Ford,* two mechanics who had actively solicited union authorization cards on behalf of the United Auto Workers were thereafter summarily discharged. Thus, the union in that case could color its picketing as a protest against the alleged unfair labor practice of the employer. Here such a facade is not available to the respondent union as Pollinger was never employed by Shell and did not previously perform work for them. Moreover, Shell played no role in his termination by their contractor, Catalytic. Thus, we urged the court to find that by picketing for Pollinger's *initial* employment, and by such picketing, attempting to establish the terms and conditions of such employment, the union violated Section 8(b)(7)(C) of the Act. The circuit court in its opinion ignored such critical distinctions and, as did the Board, relied upon *Fanelli Ford.* In so doing, we submit it committed error. This petition likewise affords the Court an opportunity to examine the validity of the *Fanelli Ford* doctrine and to determine whether it is a proper application of Section 8(b)(7) of the Act or an administratively created loophole not within the contemplation of Congress.

The legislative history of Section 8(b)(7) of the Act evidences that the evil which Congress sought to eradicate was the imposition of a collective bargaining agent through coercion rather than through the election procedures provided by the Act. *Dayton Typographical Union No. 57* v. *N.L.R.B.,* 326 F.2d 634 (D.C. Cir. 1963). The Board's *Fanelli Ford* doctrine does not advance that end. Rather it permits unions to invade an area legislatively reserved for the certified or recognized collective bargaining representative. As one commentator has observed:

> "The Board's theory [in *Fanelli Ford*] does not take into account the fact that, in picketing, the union is actually making demands on the employer concerning the wages, hours, working conditions and

> status of its employees. The employer, of course, must consider the ecomonic effects which the union's picketing has had or may have on its business and either agree to, not agree to or seek a modification of the demands. In any event, the union is either forcing the employer to bargain about its demands or is presenting its demands on a 'take it or leave it' basis, which, after all, is a venerable bargaining technique of some unions, albeit '[B]oulwareism' in reverse." Shawe, *Federal Regulation of Recognitional Picketing,* 52 Geo. L.J. 248, 257 (1964).

That comment is particularly applicable to the facts of the instant case since Pollinger did not have established wages and conditions of employment with Shell. Thus, Teamsters demanded not only the employment of Pollinger but that he be employed "[U]nder similar conditions with similar duties to those he enjoyed while employed by his former employer".[15] Shell therefore was confronted with this dilemma—accept the terms proposed by the Teamsters or enter into negotiations with them for modification of those terms. Rejecting both alernatives would subject Shell to continued picketing. Thus, the validity of the Board's *Lewis Food* rationale is apparent. Picketing for reinstatement inherently involves a recognitional object. Perforce, picketing to obtain initial employment and establish the conditions of initial employment must involve a recognitional object.[16]

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[15] In its initial letter to Shell, Teamsters demanded that Pollinger be employed under the ". . . terms of the Teamster Local 676 agreement". Obviously, belatedly recognizing the implications of that statement the union sent its second letter requesting that Pollinger be employed under "similar conditions" to those he enjoyed while employed by Catalytic. In either event however it sought recognition (45a, 47a).

[16] See *Recognitional and Organizational Picketing: Limitations on a Non-Certified Union,* 47 Minn. L.R. 1031, 1040-1041 (1963).

As several commentators have noted, when Congress enacted Section 8(b)(7) it was aware of the Board's *Lewis Food Co.* decision and having failed to state any disagreement with that case, Congress may fairly be said to have intended to impart itis theory into Section 8(b)(7).[17]

We submit therefore that *Fanelli Ford* is inapposite and contravenes the purposes of Section 8(b)(7) by permitting a labor organization to ignore the election procedures of the Act and achieve its recognitional purposes through coercion. By granting review this Court has the opportunity to restore the sound principles of *Lewis Food* and, to that extent, achieve the Congressional purpose in the enactment of Section 8(b)(7).

CONCLUSION

This case presents vital questions concerning the proper interpretation of critical provisions of the National Labor Relations Act and of the right to judicial review of orders issued by the National Labor Relations Board in jurisdictional dispute proceedings. The questions presented are of major significance in the administration of the Act and their resolution essential to the maintenance of a uniform national labor policy. Accordingly, the Court is respectfully urged to grant the petition.

Respectfully submitted,

VINCENT J. APRUZZESE
APRUZZESE & MCDERMOTT
A Professional Corporation

FRANCIS A. MASTRO
On the Petition

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[17] Browne, Section 8(b)(7) of the National Labor Relations *Act: Gestation, Travail-and Demise,* 17 Kansas L.R. 207 (1969).

APPENDIX A

Decision in 199 NLRB No. 95, October 16, 1972

D—6760
West Deptford, N. J.

October 16, 1972

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TEAMSTERS LOCAL UNION No. 676

and

SHELL CHEMICAL Co., A Division of Shell Oil Company

DECISION AND ORDER QUASHING NOTICE OF HEARING

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by Shell Chemical Co., a Division of Shell Oil Company, hereinafter Shell, alleging that Teamsters Local Union No. 676, hereinafter Respondent or Local 676, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring Shell to assign the work in dispute to an employee represented by Local 676 rather than to its own em-

ployees. A hearing was held on May 18 and June 2, 1972, before Hearing Officer Charles E. Mitchell. All parties appeared at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, Shell and Local 676 filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings of the Hearing Officer made at the hearings and finds that they are free from prejudicial error. The rulings are hereby affirmed.

Upon the entire record, the Board makes the following findings:

I. The Business of the Employer

The parties stipulated, and we find, that Shell is engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

We find, as stipulated by the parties, that Local 676 is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Dispute

A. *The Facts*

The work in dispute concerns assignment of the task of driving a 1½ ton stake-body truck making personnel and

equipment deliveries at Shell's Woodbury plant located in West Deptford, New Jersey.

The dispute centers around a former employee of Catalytic Construction Co., a subcontractor of Shell, which performs certain maintenance work at the plant. The employee, Pollinger, drove the truck and made Catalytic personnel and equipment deliveries at the plant; occasionally he also operated a forklift. Shell trained its own employees to perform certain of the maintenance work and then withdrew from Catalytic the use of its truck and forklift. Faced with diminished work to be performed for Shell, Catalytic reduced its work force and laid off several employees, including the truckdriver, who was laid off on December 9, 1971. Shell's own employees now use the truck for various purposes. Shell employs no employee classified as a driver, but rather 40 to 50 different employees do occasional driving of the truck as required and Catalytic employees now walk to their jobsites and equipment deliveries, as needed, are handled by other means. At the present time, Catalytic still employs 14 or 15 employees at the Shell plant.

Catalytic is a party to a collective-bargaining agreement with the Respondent. The terms of the agreement cover Pollinger and require Catalytic to obtain its truckdrivers from Respondent.

On December 13, 1971, Respondent's business agent, Jackson, unsuccessfully protested to Catalytic Pollinger's layoff and on December 21 wrote a letter to Shell which stated in relevant part:

> On behalf of Mr. Pollinger, we request that he be permitted to remain on the job performing his du-

> ties as before, and the terms of the Teamsters Local 676 Agreement covering him be permitted to remain in effect.

On December 29, 1971, Shell replied suggesting that Respondent direct to Catalytic its request that Pollinger be reinstated. Thereafter, on January 20, 1972, the Respondent set up a picket line and picketed the Shell plant with signs for 22 days until February 11, 1972. The picket signs read:

> Shell Unfair to William Pollinger/Unfair to Teamsters Local 676.

On January 26, the Respondent wrote Shell a letter stating that it was not seeking recognition from Shell as Pollinger's bargaining agent, but adding:

> We simply request that you employ Mr. Pollinger under similar conditions with similar duties to those he enjoyed while employed by his former employer.

Thereafter, on January 27 and on February 1, respectively, Shell filed the present Section 8(b)(4)(D) charge and amended charge.

Meanwhile, on December 22, 1971, Oil, Chemical & Atomic Workers International Union, hereinafter OCAW, filed a representation petition in Case 4—RC—9546 for a unit of Shell's Woodbury plant employees. On February 9, 1972, the Board conducted an election at the plant in a unit of production and maintenance employees, including those employees performing maintenance work formerly performed by the laid off Catalytic employees. Respondent did not intervene or participate in any manner in that

proceeding. OCAW was subsequently certified on June 16, 1972, soon after the hearing on the present charges, as the representative of the Shell employees, but has not at any time claimed the truckdriver job.

B. *The Contentions of the Parties*

Respondent contends that the picketing was not occasioned by, nor is it a manifestation of, a jurisdictional dispute. It argues that the dispute between it and Shell was over the recapture of work for a displaced employee, Pollinger.

Shell contends that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the Board should sustain Shell's assignment of the disputed work to its own employees by the issuance of an appropriate award.

C. *Applicability of the Act*

Before the Board may proceed to a determination of dispute under Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. We are unable to reach such a conclusion in this case.

The present dispute is in significant respects similar to that which existed in *Waterway Terminals Company*, 185 NLRB No. 35, where the Board held that the picketing of waterway "was solely for the object of preserving the carloading work for the employees who had been doing it . . . and that such a dispute is not the type of controversy Congress intended the Board to resolve pursuant to

Section 8(b)(4)(D) and Section 10(k) of the Act." Here, Respondent picketed for a objective—to regain work for a former Catalytic employee who had previously performed such work. Accordingly, we find that no jurisdictional dispute exists and we shall therefore quash the notice of hearing.[1]

ORDER

It is hereby ordered that the notice of hearing issued in this case be, and it hereby is, quashed.

Dated, Washington, D. C., October 11, 1972.

JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

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[1] See *Transport Workers' Union of America, AFL-CIO and Local 504 (Triangle Maintenance Corp.)*, 186 NLRB No. 71; *Safeway Stores, Incorporated*, 134 NLRB 1320; cf. *National Maritime Union (Prudential-Grace Lines, Inc.*, 194 NLRB No. 199, where the NMU, which represented the crews on the employer's east coast fleet, claimed the work and attempted to follow the transfer of certain vessels of that fleet to the employer's west coast fleet, on which its crews were represented by another union which consequently threatened to strike. The Board found that the NMU, by attempting to follow the transfer of the vessels, was not attempting to protect and preserve work which had traditionally been performed by its members, but rather was attempting to acquire work which it had never performed, and that therefore there was reasonable cause to believe that activity by the NMU violated Section 8(b)(4)(D).

Member Penello agrees that no jurisdictional dispute exists and the notice of hearing should be quashed, but finds it unnecessary to rely on *Waterway Terminals Company, supra*, because, in his view, the record here fails to establish either competing claims between classes of employees or any dispute over the assignment of particular work.

APPENDIX B

Order Denying Motion in 4-CD-282

January 18, 1973

West Deptford, N. J.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TEAMSTERS LOCAL UNION No. 676

and

SHELL CHEMICAL CO., A Division of Shell Oil Company

ORDER DENYING MOTION

On October 11, 1972, the National Labor Relations Board issued a Decision and Order Quashing Notice of Hearing in the above-entitled proceeding,[1] finding that no jurisdictional dispute exists.

Thereafter, on November 9, 1972, the Charging Party filed a Motion for Reconsideration and to Reopen Record, with brief in support requesting that the Board reopen the record and determine the dispute. Thereafter, the Respondent filed a memorandum in opposition to the Charging Party's motion.

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[1] 199 NLRB No. 95.

Appendix B

The Board, having duly considered the matter,

IT IS HEREBY ORDERED that the Charging Party's Motion for Reconsideration and to Reopen Record be, and it hereby is, denied as lacking merit.

Dated, Washington, D. C., January 15, 1973.

By direction of the Board:

HOWARD F. LEBARON
Associate Executive Secretary

APPENDIX C

Decision in 199 NLRB No. 70, October 2, 1972

October 2, 1972

D—6701

West Deptford, N. J.

Case 4-CP-179

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TEAMSTERS LOCAL UNION No. 676

and

SHELL CHEMICAL COMPANY,
A Division of Shell Oil Company

DECISION AND ORDER

Upon a charge[1] and amended charge[2] duly filed by Shell Chemical Company, a Division of Shell Oil Company

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[1] The original charge was filed and served on Respondent on January 27, 1972.

[2] The amended charge was filed and served on Respondent on February 1, 1972.

(herein called Shell), against Teamsters Local Union No. 676 (herein called Respondent), the General Counsel of the National Labor Relations Board, by its Regional Director for Region 4, on February 29, 1972, issued and served on the parties a complaint alleging violations of the National Labor Relations Act, as amended. In substance, the complaint alleges that Respondent violated Section 8(b)(7)(C) of the Act by engaging in recognitional picketing at Shell's plant for more than a reasonable period of time without filing a representation petition for a Board election.

Respondent's answer admits certain factual allegations of the complaint but denies the commission of any unfair labor practices.

Thereafter, on May 15, 1972, the parties entered into a stipulation wherein they agreed that certain documents shall constitute the entire record herein,[3] expressly waived all intermediate proceedings before a Trial Examiner, and submitted this case directly to the Board for its decision and order, reserving to themselves the right to file briefs. By order dated May 22, 1972, the Board approved the stipulation, transferred the proceeding to itself, and set a date for the filing of briefs. Thereafter, briefs were filed by the General Counsel and by Shell.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[3] The stipulated record consists of the charges, complaint, Respondent's answer, the stipulation with attached exhibits, and the transcript from a Section 10(1) Federal district court proceeding in this matter.

Appendix C

The Board has considered the entire record herein and the briefs, and makes the following:

Findings of Fact

I. *The Business of Shell*

Shell, a Delaware corporation, is engaged in the manufacture and nonretail sale of chemicals at its plant located in West Deptford, New Jersey. During the past calendar year Shell, in the course and conduct of its operations, sold and shipped chemicals and related products valued in excess of $50,000 directly to customers located outside the State of New Jersey. We find that Shell is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. Respondent's Status as a Labor Organization

The parties stipulated, and we find that Respondent is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Stipulated Facts*

For the past 10 years, Catalytic, Inc., has performed maintenance service at Shell's plant. In connection with this work, Catalytic has employed members of various labor organizations to work at the Shell plant, including William Pollinger, a truckdriver and member of Respond-

ent. Catalytic is a party to a collective-bargaining agreement with Respondent.

On December 9, 1971, Catalytic laid off 11 of its employees, including Pollinger, because Shell had increased the amount of maintenance work done by its own employees. However, Catalytic still employs 14 or 15 employees to work at the Shell plant.

During his employment by Catalytic, Pollinger drove a truck owned by Shell. After his layoff, the truck was returned to Shell and, thereafter, at least eight Shell employees have from time to time driven the truck in performing the duties formerly performed by Pollinger.

On December 13, 1971, Jackson, business agent for Respondent, unsuccessfully protested to Catalytic Pollinger's layoff. On December 21 Jackson wrote a letter to Shell which stated, *inter alia*:

> On behalf of Mr. Pollinger, we request that he be permitted to remain on the job performing his duties as before, and the terms of the Teamsters Local 676 Agreement covering him be permitted to remain in effect.

On December 29, Shell wrote Respondent suggesting that it direct to Catalytic its request that Pollinger be reinstated.

On January 20, 1972, Respondent began picketing at the Shell plant. The pickets carried signs stating, "Shell Unfair to William Pollinger/Unfair to Teamsters Local 676."

However, within the week, on January 26, Respondent wrote Shell a letter stating that it was not seeking recog-

nition from Shell as Pollinger's bargaining representative, but it was merely requesting:

> [T]hat you employ Mr. Pollinger under similar conditions with similar duties to those he enjoyed while employed by his former employer.

Respondent ceased its picketing activity on February 11.

B. *Contentions of the Parties*

The arguments raised in the General Counsel's and Shell's briefs are substantially the same, i.e.:

1. Respondent's picketing was for a recognitional object.

2. On the basis of the *Waterway Terminals*[4] case, such picketing violated Section 8(b)(7)(C) of the Act.

3. Respondent's 22 days of picketing activity went beyond a reasonable period of time without a petition being filed by it.

Respondent filed no brief. As an affirmative defense in its answer, Respondent disclaimed a recognitional object in the picketing, and it asserted that the object of the picketing was "to provide work opportunities for William Pollinger."

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[4] *International Longshoremen's and Warehousemen's Union Local No. 8 (Waterway Terminals Company)*, 193 NLRB No. 65.

Appendix C

C. *Discussion and Conclusions*

In urging the Board to find that Respondent had a recognitional object in its picketing, the General Counsel and Shell rely heavily on our decision in *Waterways Terminals.* Despite some similarities between that case and the instant matter, we find that the facts involved herein make these two cases distinguishable.

Thus, in *Waterway Terminals,* the respondent labor organization demanded as the price for withholding pickets an arrangement whereby its members would effect a mass displacement of the employees of Waterway who were represented by another labor organization. As the Trial Examiner pointed out in that case:

> Viewed realistically, the immediate objective of Respondent's demands and the inevitable consequence of Waterway's acquiescence would have been the establishment of [Respondent] as the dominant voice in the representation of 60 or 70 employees affected by the change.

Here, however, Respondent was seeking the employment by Shell of only one employee at a time when no labor organization represented any of its employees. Shell's total workforce was in excess of 130 employees. Thus it is clear that Respondent would not have had a dominant voice in the representation of Shell's employees if Shell had hired Pollinger and reassigned those employees who had been performing Pollinger's truckdriving duties.

Appendix C

In *Fanelli Ford Sales, Inc.*,[5] a case more analogous to the instant situation, the Board held that picketing for the reinstatement of a discharged employee was not *per se* picketing for a recognitional object.[6] Rather, we there established that before the Board will infer a broader objective, an affirmative showing of such object must be made by the General Counsel.

We conclude that there has been no such showing in this case. In its first written demand to Shell that Pollinger be employed, Respondent requested that the terms of the collective-bargaining agreement negotiated between Respondent and Catalytic on Pollinger's behalf be permitted to remain in effect if he were hired by Shell. Later, after picketing had begun Respondent clarified this demand when it informed Shell that it was not seeking to represent Pollinger but only to obtain his employment by Shell under the same wages and working conditions he enjoyed during his employment by Catalytic. We find that by picketing to enforce these demands, Respondent was merely attempting to obtain employment for Pollinger with wages and working conditions similar to those which he enjoyed under his former employer. Accordingly, we find from the above the General Counsel has not proven that Respondent violated Section 8(b)(7)(C) of the Act and therefore we shall dismiss the complaint.

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[5] *Local 259, International Union United Automobile, Aircraft and Agricultural Implement Workers of America, UAW, AFL-CIO (Fanelli Ford Sales, Inc.)*, 133 NLRB 1468.

[6] The Board thus expressly overruled *Meat & Provision Drivers Union, Local No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (Lewis Food Company)*, 115 NLRB 890.

Appendix C

CONCLUSIONS OF LAW

1. Shell Chemical Company, a Division of Shell Oil Company, is, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local Union No. 676 is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By picketing Shell's plant from January 20 to February 11, 1972, Respondent did not violate Section 8(b)(7)(C) of the Act.

ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D. C. September 29, 1972

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX D

Order Denying Motion in 4-CP-179

West Deptford, N. J.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 4-CP-179

TEAMSTERS LOCAL UNION No. 676

and

SHELL CHEMICAL COMPANY, a Division of Shell Oil Company,

ORDER

On September 29, 1972, the National Labor Relations Board issued a Decision and Order[1] in the above-entitled proceeding, dismissing the complaint on the ground that by picketing Shell's plant from January 20 to February 11, 1972, Respondent did not violate Section 8(b)(7)(C) of the Act.

Thereafter, on November 9, 1972, Shell filed a Motion for Reconsideration and to Reopen Record. And, on No-

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[1] 199 NLRB No. 70.

vember 22, 1972, Respondent filed an opposition brief. In its Motion, Shell contends that the opinion of the United States Court of Appeals for the Ninth Circuit in *Waterway Terminals Co.* v. *N.L.R.B.*,[2] as well as a reexamination of the record evidence submitted in the above-entitled proceeding, requires a finding by the Board that Respondent violates the Act as alleged in the complaint.

The Board having duly considered the matter, IT IS HEREBY ORDERED that Shell's Motion for Reconsideration and to Reopen Record be, and it hereby is, denied because it is lacking in merit and presents no additional evidence of a material fact which would cause the Board to reach a different result in this matter.

Dated, Washington, D. C., January 15, 1973.

By direction of the Board

HOWARD F. LEBARON
Associate Executive Secretary

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[2] ——F.2d ——, 81 LRRM 2449 (CA 9, October 10, 1972).

APPENDIX E

Opinion of the United States Court of Appeals

United States Court of Appeals,
Fifth Circuit.

Nos. 73-1399, 73-1401.

SHELL CHEMICAL COMPANY, a Division of Shell Oil Company,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

June 14, 1974.

Petitions for Review of the Orders of the National Labor Relations Board (Texas Case).

Before TUTTLE, GEWIN and RONEY, Circuit Judges.

TUTTLE, Circuit Judge:

These cases are before us on the petitions of Shell Chemical Company (Shell) to review two decisions by the National Labor Relations Board (Board). They stem from charges filed by Shell with the Board against Teamsters Local 676 for picketing and other conduct in violation of

section 8(b)(4)(D) and section 8(b)(7) of the National Labor Relations Act (Act). Carried with the suit dealing with the section 8(b)(4)(D) charge, petition No. 73-1399, is a motion by the Board to dismiss the petition for want of jurisdiction.

Facts

Shell is a Delaware corporation engaged in the manufacture and non-retail sales of chemicals at its plant located in West Deptford, New Jersey. For the past ten years, Catalytic, Inc., (Catalytic) has performed maintenance services at Shell's plant. In connection with this work, Catalytic employed a truck driver named William Pollinger. Pollinger functioned primarily as a truck driver, transporting Catalytic personnel and equipment to the job site, and occasionally operated a forklift. During this time Catalytic was a party to a collective bargaining agreement with Local 676 of the Teamsters, of which Pollinger is a member. On December 9, 1971, Catalytic laid off eleven of its employees, including Pollinger, because Shell had increased the amount of maintenance work done by its own employees and withdrawn from Catalytic the use of its truck and forklift which had been operated by Pollinger. Catalytic still employed fourteen or fifteen men at the Shell plant.

Subsequent to Pollinger's lay off and the return of the truck to Shell, Catalytic employees walked to the job site and equipment deliveries were handled by other means. The truck, which had been driven by Pollinger but which was owned by Shell, was driven by a number (approximately eight) of Shell employees, who handled maintenance support tasks involving the truck on an ad hoc

basis. At no time after Pollinger's lay off did Shell employ anyone classified as a truck driver.

On December 13, 1971, Moses Jackson, Local 676 Business Agent, unsuccessfully protested Pollinger's lay off to Catalytic. Attempting a different tack, on December 21, Jackson wrote a letter to Shell which stated in part: "On behalf of Mr. Pollinger, we request that he be permitted to remain on the job performing his duties as before, and the terms of the Teamsters Local 676 agreement covering him be permitted to remain in effect." Shell replied suggesting that Local 676 direct its request that Pollinger be reinstated to Catalytic. Thereafter, on January 20, 1972, Local 676 set up a picket line and picketed the Shell plant for twenty-two days, ceasing on February 11. The pickets carried signs stating, "Shell unfair to William Pollinger/unfair to Teamster Local 676." [sic] Meanwhile, Local 676 had written, on January 26, Shell a letter stating it was not seeking *recognition* from Shell as Pollinger's bargaining representative, and added, "We simply request that you employ Mr. Pollinger under similar conditions with similar duties to those he enjoyed while employed by his former employer."

On February 9, 1972, the Board conducted an election at Shell's plant for a unit of production and maintenance employees, including those employees doing the maintenance formerly performed by the laid off Catalytic employees. This election was held pursuant to a petition filed on December 22, 1971, (shortly after Catalytic had laid off eleven employees doing maintenance work at Shell's plant) by the Oil, Chemical and Atomic Workers International Union (OCAW). Teamsters Local 676 did not intervene or participate in any manner in that elec-

tion. In June, 1972, OCAW was certified as the representative of the Shell employees. At no time has OCAW claimed assignment for its members of the truck driver job previously held by Pollinger. In fact no such particular job any longer existed.

On January 27, 1972, Shell filed charges alleging that Teamsters Local 676 had violated the Act, section 8(b)(4)(D),[1] by attempting to force Shell to assign work to Local 676 rather than to the employees represented by OCAW, and section 8(b)(7),[2] by picketing Shell with a *recognitional* object. In processing the section 8(b)(4)(D) charge, the Board instituted the prerequisite proceed-

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[1] Section 8(b)(4)(D), 29 U.S.C.A. § 158(b)(4)(D), provides, in pertinent part, that it "shall be an unfair labor practice for a labor organization or its agents (i) to engage in or encourage a strike or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

> "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

[2] Section 8(b)(7), 29 U.S.C.A. § 158(b)(7), in relevant part, makes it an unfair labor practice for a union to picket an employer "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . (C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. . . ."

ing under section 10(k) of the Act.[3] The Board found that the object of Local 676 picketing was to gain reinstatement for Pollinger, and did not involve a contest with another union over the work performed by Pollinger. Accordingly, the Board concluded that no *jurisdictional* dispute existed between the unions within the meaning of section 10(k) and quashed the notice of hearing under section 10(k). 199 N.L.R.B. No. 95 (1973). In their motion to dismiss, the Board asserts that the quashing of the notice of hearing is not reviewable under the Act, therefore denying jurisdiction to this Court. In the proceeding on the section 8(b)(7) charge, the Board concluded that the picketing by Local 676 did not have a recognitional object. Finding no violation of section 8(b)(7), the complaint was dismissed. Shell petitions for review.

SECTION 10(K) AND REVIEWABILITY

[1-3] Except as authorized by statute, a court of appeals does not have jurisdiction to review actions of the

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[3] Section 10(k), 29 U.S.C.A. § 160(k), provides:

> "(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Board. American Federation of Labor v. NLRB, 308 U.S. 401, 404, 60 S. Ct. 300, 84 L. Ed. 347 (1940). Section 10 of the Act, 29 U.S.C.A. § 160, is the sole provision vesting review with the courts of appeal. The Board argues, and the structure of the Act and case law support, that "order" as employed in sections 10(e)[4] and section 10(f)[5] refer to an order issuing from an unfair labor practice proceeding. In section 10(e), which first utilizes the term "order", and in section 10(f), under which petitioner must establish the jurisdiction of this Court, the

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[4] This is the complement provision of section 10(f) which allows the Board to petition the court of appeals for enforcement of its "final orders."

[5] Section 10(f) provides, in part:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

order referred to is clearly that resulting from the culmination of the procedure outlined in section 10(b) and (c), 29 U.S.C.A. § 160(b) and (c),[6] which involves either the dismissal of an unfair labor practice complaint or the granting of relief relating to an unfair labor practice. The courts of appeal have consistently viewed the Board's actions accepted for review in this framework.[7] In Laundry Workers v. NLRB, *supra*, 197 F.2d 701, where this Court specifically addressed the question of what constitutes a final order under section 10(f), we stated[8]:

> "Agreeing with, we adopt as our own, the following from the brief of the Board:
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> 'Under the decisions of the Supreme Court and the courts of appeals it has long been established that the phrase "a final order of the Board", as used in this section, refers solely to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices found—in either case an order entered as the culmination of the procedure described in Section 10(b) and (c) of the Act.

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[6] These subsections outline the procedure for initiating and conducting the adjudication of an unfair labor practice complaint.

[7] American Federation of Labor v. NLRB, *supra*, 308 U.S. at 405-408; Anthony v. NLRB, 204 F.2d 832 (6th Cir. 1953); Manhattan Construction Co. v. NLRB, 198 F.2d 320 (10th Cir. 1952); Laundry Workers v. NLRB, 197 F.2d 701 (5th Cir. 1952); General Drivers, Chauffeurs, and Helpers v. NLRB, 179 F.2d 492 (10th Cir. 1950); Lincourt v. NLRB, 170 F.2d 306 (1st Cir. 1948).

[8] In *Laundry Workers*, the petitioner was seeking to review the Board's refusal to issue a subpoena *duces tecum* as a final order under section 10(f).

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'Accordingly, attempts to obtain review in the courts of appeals of Board action, short of an order issued at the completion of the procedure specified in 10(b) and (c), have uniformly failed. Thus, it has been held that 10(f) does not confer jurisdiction upon the courts of appeals: to review certifications, which the Board has either issued or declined to issue, at the conclusion of representation proceedings under Section 9; to review other Board decisions in representation proceedings, respecting such things as the holding of an election, the appropriateness of particular units, and the labor organizations eligible to appear on the ballot; or to review the Board's action in scheduling hearings in unfair labor practice cases.

'Similarly, it has been held that the action of the General Counsel, in dismissing an unfair labor practice charge and declining to issue a complaint, is not a "final order" within Section 10(f), so that the courts of appeals are without jurisdiction to review such action'." *Id.* at 703.

Since a section 10(k) proceeding is not the dismissal of a complaint of an unfair labor practice or the granting of relief, as provided in section 10(b) and (c), the quashing of the notice of a section 10(k) proceeding should not be considered a reviewable order under section 10(f).[9]

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[9] Manhattan Construction Company v. NLRB, *supra*, 198 F.2d 320; Trane Company v. NLRB, 68 L.R.R.M. 3024 (6th Cir. 1968) (per curiam granting of motion to dismiss); Rafel & Company v. Local 9, IBEW, 47 L.R.R.M. 2897 (7th Cir.), cert. denied, 366 U. S. 948, 81 S. Ct. 1902, 6 L. Ed. 2d 1241 (1961) (per curiam granting of a motion to dismiss). *Cf.* Bricklayers, etc. v. NLRB, 155 U. S. App. D. C. 47, 475 F. 2d 1316 (1973). *Contra,* Waterway Terminal Co. v. NLRB, 467 F. 2d 1011 (9th Cir. 1972).

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The legislative history of section 10(k) is not conclusive on this question, but does offer some support for denying review. When section 10(k) was added to the Act, Congress did not amend section 10(e) and (f) or indicate any intention to expand the term "final order." Congress, in fact, rejected a proposal which would have achieved this result. The Taft-Hartley Act, as originally drafted, provided only that a jurisdictional dispute was an unfair labor practice. Section 10(k) was added in the Senate Bill which required the appointment of arbitrators by the Board to determine any jurisdictional dispute. Their decision was to be given the status of "a final order of the Board." Sen. Rep. No. 105, 80th Congress, 1st Sess. at 40; I Legislative History of the Labor Management Relations Act of 1947, at 466 (1948). In a conference of the House and Senate committees, however, Congress decided not to employ the arbitration approach and rejected these provisions.[10]

The purpose and structure of section 10(k) evince that Congress was providing for the resolution of jurisdictional disputes, labor organizations competing for same work assignment, without the cumbersome, fault determining, and coercive process of an unfair labor practice proceeding under section 8(b)(4)(D).[11] The Supreme

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[10] Although relevant, the elimination of the final order status of a section 10(k) proceeding can probably be attributed to a rejection of the arbitration approach rather than a concern with the issue of review. *Cf.* NLRB v. Radio, etc., Engineers, 364 U. S. 573, 581-582, 81 S. Ct. 330, 5 L. Ed. 2d 302 (1961).

[11] Congress was seeking a no penalty resolution of jurisdictional disputes in order to protect employers and the public from becoming "the helpless victims of quarrels that do not concern them at all." H.R.Rep. No. 245, 80th Congress, 1st Sess. at 23, cited in

(Footnote continued on following page)

Court in NLRB v. Plasterers', etc., Union, 404 U. S. 116, 122 n. 10, 92 S. Ct. 360, 365, 30 L. Ed. 2d 312 (1972), described the interaction of a section 10(k) proceeding with a section 8(b)(4)(D) unfair labor practice charge[12]:

> "The § 10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse § 10(k) decision, the Board must prove the union guilty of a § 8(b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a § 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D), determination. International Typographical Union, 125 N.L.R.B. 759, 761 (1959). Both parties may put in new evidence at the § 8(b)(4)(D) stage, although often, as in the present case, the parties agree to stipulate the record of the § 10(k) hearing as a basis for the Board's determination of the unfair labor practice. Finally, to exercise its powers under § 10(k), the Board need only find that there

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NLRB v. Radio Engineers, *supra,* 364 at 581, n. 20. Or as phrased by the court in *Bricklayers, etc., supra,* 475 F. 2d at 1320:

> "The threat to or coercion of the employer which gives rise to the charge of the unfair labor practice [section 8(b)(4)(D)] is sought by Congress through section 10(k) to be ended so that the work can proceed. Voluntary settlement is encouraged. If this does not eventuate, hope remains that the ensuing determination of the dispute by the Board will solve the matter."

[12] This process is aptly illustrated by the procedural description in NLRB v. International Longshoremen's and Warehousemen's Union, 378 F. 2d 33 (9th Cir. 1967), and NLRB v. Local 991, International Longshoremen's Association, 332 F. 2d 66, 69-71 (5th Cir. 1964).

is reasonable cause to believe that a § 8(b)(4)(D) violation has occurred, while in the § 8(b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8(b)(4)(D). *International Typographical Union, supra,* at 761 n. 5 (1959)."

When an unfair labor practice charge, other than 8(b)(4)(D), is filed under section 10(k), a preliminary investigation is made to determine whether the charge has enough prima facie merit to warrant issuance of a complaint. If so, a formal adjudication of the unfair labor practice follows. In contrast, the section 10(k) process does not take this usual course. As the Supreme Court noted in NLRB v. Plasterers', etc., Local Union No. 79, *supra,* 404 U. S. at 122 n. 10, a complaint on a section 8(b)(4)(D) charge does not issue until after the provisions of section 10(k) have been satisfied.

[4] Under section 10(k) the Board issues a notice for a hearing. If the dispute has been adjusted, or if the Board finds no reasonable cause to believe that section 8(b)(4)(D) has been violated, because, as here, no jurisdictional dispute exists, the notice of hearing is quashed and the charge dismissed. If the parties achieve a voluntary settlement of the dispute, or if the Board decides the dispute under section 10 (k) and the parties comply, the unfair labor practice complaint is also dismissed. In each of these situations, the unfair labor practice charge under section 8(b)(4)(D) is precluded from adjudication. The point is that there is no adjudication as provided for in section 10(b) and (c) which is reviewable under section 10(f). Granted that "the impact of the section 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all

practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding,"[13] but its function is merely to set in motion the machinery for determining whether a complaint under section 8(b)(4)(D) should issue. Manhattan Construction Company v. NLRB *supra*, 198 F.2d at 321. It is the subsequent section 8(b)(4)(D) proceeding which adjudicates the unfair labor practice charge and which is appealable under section 10(f). Based on the relationship of a jurisdictional dispute and a section 8(b)(4)(D) unfair labor practice, the Court of Appeals for the District of Columbia concluded similarly, in *Bricklayers, etc., supra*, 475 F.2d 1316, that a section 10(k) determination is not a "final disposition" or adjudication within the meaning of the Administrative Procedure Act, 5 U.S.C.A. § 554.

[5] Only if there is a determination of the dispute under section 10(k) and a subsequent refusal to comply, does a complaint issue on the unfair labor practice charge and proceed to a Board order. That is, in fact, the only manner in which a section 10(k) work award is reviewable—on review of a section 8(b)(4)(D) order. NLRB v. Local 991, International Longshoremen's Association, *supra*, 332 F.2d at 69-71. In this regard, the non-reviewable nature of a section 10(k) proceeding is like the representational certification procedure of section 9. A Board certification of a union as an employee bargaining representative is only reviewable if the employer refuses to bargain and an order under section 8(a)(5) issues from an unfair labor practice proceeding. The certification it-

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[13] NLRB v. Plasterers', etc., Union No. 79, *supra*, 404 U. S. at 126-127.

self is not reviewable. American Federation of Labor v. NLRB, *supra*, 308 U.S. at 408-412.

[6] The scheme of the Act was drawn by Congress to allow appeal under section 10(e) and (f) only from a final order stemming from the unfair labor practice procedure of section 10(b) and (c). Other matters, such as determining the presence of a prima facie complaint for an unfair labor practice or certifying labor representatives, Congress meant to leave exclusively with the Board.[14] Like these, a quashing of the notice of hearing under section 10(k) is not adjudicatory in nature or final as defined by section 10(f). The motion of the Board to dismiss for want of jurisdiction is granted.[14a]

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[14] *See* Laundry Workers v. NLRB, *supra*, 197 F. 2d at 703.

[14a] Lest it appear that the failure to allow review of this action by the Board deprives the employer of some right to protect itself against this kind of picketing we think it appropriate to make the following comment. Upon the assumption that the Board was correct in dismissing the section 10(k) proceeding on the ground that the dispute or the conduct of the Teamsters relative to Shell and its employees was not a "jurisdictional" dispute, it makes no difference to Shell that the action of the Board is not reviewable. Because if upon review we still have the view that the Board was correct in its determination that this was not a jurisdictional dispute, the Act does not afford any remedy to the picketed employer. In other words, it is only if either the Board in a section 10(k) proceeding or the court on review, assuming we reviewed it, determines that this dispute was jurisdictional, assigns the work to OCAW, and the Teamsters continue to picket, that Shell would have relief through a section 8(b)(4) action.

(Footnote continued on following page)

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Shell urges the damage accomplished by the alleged unfair picketing as demanding relief. The Supreme Court in Garner v. Teamsters Union, 346 U. S. 485 (74 S. Ct. 161, 98 L. Ed. 228) (1953), however, has pointed out:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Id.* at 499-500.

Shell still had alternate causes of action under the Act for any illegal picketing. In fact, Shell filed other charges under section 8(b)(4)(B), secondary boycott, and section 8(b)(7)(C), recognitional picketing, and has sought damages in a suit in New Jersey under section 303, 29 U.S.C.A. § 187. While the other unfair labor practice charges have had no success, the damage suit is still viable. It withstood a motion for summary judgment; the court finding that the section 10(k) proceeding did not "possess any attributes of finality," therefore, lacking any res judicata effect. Some small scope has also been left by the Norris-LaGuardia Act, 29 U.S.C.A. § 107, for the issuance of injunctions by federal courts. Finally, to the extent that the picketing is not forbidden or protected by the Act but is prohibited by state law, Shell is free to pursue its remedies in the state court. *Cf.* Garner v. Teamsters Union, *supra*, 346 U. S. at 488; Algoma Plywood Co. v. Wisconsin Board, 336 U. S. 301, 313, 69 S. Ct. 584, 93 L. Ed. 691 (1949); Hill v. Florida ex rel. Watson, 325 U. S. 538, 539, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945); Allen-Bradley Local v. Wisconsin Board, 315 U. S. 740, 748-751, 62 S. Ct. 820, 86 L. Ed. 1154 (1942).

Appendix E

THE SECTION 8(b)(7) VIOLATION

Consolidated on this appeal, is also a petition for review of the dismissal of a complaint by the Board charging a violation of section 8(b)(7)(C). This provision, 29 U.S.C.A. § 158(b)(7)(C), states:

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> (C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing. . . ."

The principle element of a section 8(b)(7) violation is for an uncertified union to picket with "an object" of "forcing or requiring" an employer to recognize the picketing union as his employees' bargaining agent, or "forcing or requiring" the employees to organize as members of the union. Therefore, central to a finding of an unfair labor practice under section 8(b)(7) is a determination of the *object* of the picketing. Here, in reject-

ing Shell's claim that the picketing had a recognitional or representational purpose, the Board stated:

> ". . . We find that by picketing to enforce these demands, Respondent was merely attempting to obtain employment for Pollinger with wages and working conditions similar to those which he enjoyed under his former employer. Accordingly, we find from the above that the general counsel has not proven that Respondent violated section 8(b)(7)(C) of the Act and therefore we shall dismiss the complaint."

Shell would have this Court reverse the holding of the Board, and find that the picketing had a recognitional object.

[7] The Board relied on Fanelli Ford Sales, Inc., 133 NLRB 1468 (1961) to support their ruling. *Fanelli* expressly reversed Lewis Food Co., 115 NLRB 890 (1956), under which the Board had promulgated a ruling that established *any* picketing for reinstatement as recognitional and, therefore, violative of section 8(b)(7). In *Fanelli*, the Board rejected *Lewis Food Co.*:

> "The *Lewis Food* case held, member Peterson dissenting, that a strike or picketing by a union to obtain reinstatement of a discharged employee 'necessarily' is to compel recognition or bargaining on such matter and that such conduct violates Section 8(b)(4)(C) of the Act. Our dissenting colleague would apply *Lewis Food* to the present 8(b)(7) situation. It may not be gainsaid, of course, that picketing for an employee's reinstatement may in some circumstances be used as a pretext for

obtaining recognition as collective-bargaining representative of all employees in a certain unit. Before we are willing to infer such broader objective, some more affirmative showing of such object must be made than exists here. So far as this record indicates, Respondent's picketing would have ceased if the Employer, without recognizing or, indeed, exchanging a word with the Respondent, had reinstated Marrone. We find in this case that the picketing was directed solely at securing Marrone's reinstatement. We further find that such conduct does not violate section 8(b)(7) of the Act. We accordingly overrule *Lewis Food* to the extent inconsistent herewith."

We agree with the Board's position in *Fanelli* that not all picketing for reinstatement is *per se* recognitional picketing.[15]

Shell contends that the union's objective manifestations undermine the Board's finding. Shell places great importance on the first letter composed by the union. Considering the other factors and the second letter, the first correspondence would "not create a presumption that the picketing is unlawful." McCleod v. Local 140, Bedding, Curtain and Drapery Workers Union, 207 F.Supp. 525, 528 (S.D.N.Y. 1962). Furthermore, the Board, which is charged with investigative and fact finding responsibilities, could appropriately find that the second letter was a clear explanation of the union's aims. Nor does the wording of the picket signs indicate a recognitional purpose—"Shell unfair to William Pollinger/unfair to Team-

[15] *See* Comment, Illegal Picketing under Section 8(b)(7)—A Reexamination, 68 Colum. L. Rev. 745 (1968).

sters Local 676." Signs analogous to the one used by the union in this case, have been held not to be persuasive evidence of a recognitional objective.[16]

At all times the union's actions were consistent with the Board's finding that their objective was to obtain the return of the truck driving job to Pollinger. The union first made inquiries to Catalytic for Pollinger's rehire. When this proved inadequate, Shell was approached. During part of this time an election for bargaining representative was being conducted at Shell's plant. The union did not intervene or participate in these proceedings or preliminary maneuvers leading to certification. At no time had the union attempted to obtain authorization cards from Shell's employees or organize them in any manner.

[8] Shell argues that the Board's decision in Waterway Terminals, 193 NLRB 65, finding a section 8(b)(7) violation is controlling. There, Waterway, a freight interchanger unloading freight from barges and reloading it upon trucks and rail cars terminated its contract with the company employed to do most of the reloading onto the railway cars. The work was then done by Waterway employees who were represented totally by IBU. ILWU represented the sixty to seventy employees displaced by the cancelling of the subcontract. ILWU attempted to convince Waterway to retain these employees and bargain with ILWU as their representative. When Waterway refused, ILWU picketed with the stated purpose of

[16] NLRB v. Suffolk County District Counsel of Carpenters, 387 F. 2d 170 (2d Cir. 1967); NLRB v. Local 239, International Brotherhood of Teamsters, 340 F. 2d 1020 (2d Cir. 1965).

reinstatement of these sixty to seventy employees. The Board found a violation of section 8(b)(7). In the present case, the Board distinguished *Waterway*:

> "Thus, in *Waterway Terminals*, the Respondent labor organization demanded as the price for withholding pickets an arrangement whereby its members would effect a mass displacement of the employees of Waterway who were represented by another labor organization. As the Trial Examiner pointed out in that case:
>
> > 'Viewed realistically, the immediate objective of Respondent's demands and the inadvertible consequence of Waterway's acquiescence would have been the establishment of [Respondent] as the dominant voice in the representation of sixty or seventy employees affected by the change.'
>
> "Here, however, Respondent was seeking the employment by Shell of only one employee at a time when no labor organization represented any of its employees. Shell's total work force was in excess of 130 employees. Thus it is clear that Respondent would not have had a dominant voice in the representation of Shell's employees if Shell had hired Pollinger and reassigned those employees who had been performing Pollinger's truck driving duties."

While agreeing with the Board that *Waterway* is not controlling, we do not adopt the Board's "dominant voice" standard. The number of employees whose reinstatement is sought compared to the number of employees in the production unit involved, is certainly one factor which may weigh heavily in determining the picketing's objec-

tive. The fact, that in this case, the reinstatement of only one employee is sought by the union is the mainstay supporting the Board's decision. But it is not necessary to exclude situations involving less than majority control or subterfuges such as a few employees fronting for the union. Just as an artfully worded picket sign is not determinative, the number of employees seeking reinstatement should not be the only factor examined. The object of picketing in a section 8(b)(7) complaint is primarily a fact determination. Therefore, all elements of proof relevant to the issue are important.[17]

[9, 10] The standard of review requires that the Board's dismissal of the complaint be supported by substantial evidence in the record.[18] 29 U.S.C.A. § 160(f). Considering the findings concerning the actions the union did and did not take on which the Board based its dismissal, we conclude there was substantial evidence in the record to indicate that the object of the picketing was reinstatement.

Motion to dismiss petition No. 73-1399 is granted. The petition for review in No. 73-1401 is denied.

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[17] *See* NLRB v. Knitgoods, 403 F. 2d 388, 390 (2d Cir. 1968) ("The wording of the signs, the solicitation of authorization cards, the threats of boycott and the general application of economic pressure are substantial evidence of the recognitional nature of the picketing.").

[18] NLRB v. United Brotherhood of Carpenters and Journeymen of America, Local 745, 450 F. 2d 1255 (9th Cir. 1971); Teamsters Local Union No. 5 v. NLRB, 405 F. 2d 864 (5th Cir. 1968).

APPENDIX F

Judgment

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1399
No. 73-1401

SHELL CHEMICAL CO., A DIVISION OF SHELL OIL COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Before:

Tuttle, Gewin and Roney, Circuit Judges. Tuttle, Circuit Judge.

THIS CAUSE came on to be heard upon the petitions of Shell Chemical Company, a Division of Shell Oil Company, dismissing the complaint in No. 73-1401 and an order of the National Labor Relations Board dated October 11, 1972, quashing the notice of hearing in No. 73-1399. The Court heard argument of respective counsel on December 11, 1973 and has considered the briefs and transcript of record filed in this cause. On June 14, 1974,

the Court being fully advised in the premises, handed down its decision granting the Board's motion to dismiss petition in No. 73-1399 and denying petition for review in No. 73-1401.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the motion to dismiss petition for review in No. 73-1399 be and it hereby is granted and that the petition for review of Board's dismissal of the complaint in No. 73-1401 be and it hereby is denied.

ENTERED: JUL 8 1974

Issued as Mandate: JUL 30 1974

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By .....
Deputy
New Orleans, Louisiana
JUL 30 1974

APPENDIX G

Relevant Statutes

29 U.S.C. § 158(b)(4)(D)

• • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

• • •

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

• • •

Appendix G

29 U.S.C. § 8(b)(7)(C)

• • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

• • •

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

• • •

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159 (c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the

public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection.

29 U.S.C. §160 (f)

REVIEW OF FINAL ORDER OF BOARD ON PETITION TO COURT

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an

application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

29 U.S.C. §160 (k)

HEARINGS ON JURISDICTIONAL STRIKES

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Appendix G

ADMINSTRATIVE PROCEDURES ACT

5 U.S.C. §704.

ACTIONS REVIEWABLE

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.